

225521

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE (202) 663-7849

William A. Mullins

Direct Dial: (202) 663-7823
E-Mail: wmullins@bakerandmiller.com

August 11, 2009

BY E-FILING

The Honorable Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *Union Pacific Railroad Company – Abandonment – In New Madrid, Scott, and
Stoddard Counties, Missouri*
STB Docket No. AB-33 (Sub-No. 261)

Dear Acting Secretary Quinlan:

On August 4, 2009, Mississippi Central Railroad Co. ("MSCI") filed a revised offer of financial assistance ("ROFA") to acquire a 4.85-mile line of railroad (the "Segment" – described more fully in the ROFA) that would otherwise be subject to abandonment by the Union Pacific Railroad Company ("UP") pursuant to authority the Board granted to UP in a decision served in this proceeding on June 17, 2009. The ROFA that MSCI has filed is designed to preserve service to Tetra Pak, Inc. ("Tetra Pak") – a shipper located on the Segment, an active user of UP's rail service, and a protestant of UP's proposed abandonment – and Cargill Ag Horizons ("Cargill"). Although UP had cooperated with MSCI in earlier phases of this matter, UP filed on August 7, 2009, a letter (the "Opposition Letter") stating UP's opposition to the ROFA, and urging rejection of the ROFA. MSCI hereby responds to UP's Opposition Letter to urge the Board to continue the subject OFA process consistent with agency policy and recent precedent.

The UP Opposition Letter, although not specifically entitled as such, appears to be styled as a motion to reject the ROFA. Alternatively, the Opposition Letter might be regarded as a reply to ROFA. If the Opposition Letter is a motion to dismiss, which MSCI believes to be the case, then MSCI hereby responds to the Opposition Letter as it is entitled to pursuant to 49 CFR 1104.13(a). If, on the other hand, the Opposition Letter is viewed as a reply to the ROFA despite the absence of any clear characterization of UP's filing as such, then MSCI hereby respectfully requests leave to file this response. MSCI submits that its response to UP's Opposition Letter will provide the Board with a more complete record upon which to evaluate MSCI's OFA, and will uphold ongoing efforts, consistent with Board policy, to preserve rail service over a line

The Honorable Anne K. Quinlan
August 11, 2009
Page 2 of 4

segment that, in the absence of a successfully-concluded OFA process, would very likely suffer the complete cessation of rail service.¹

The overarching objective of the Board's OFA process is the preservation of rail service on lines that otherwise would be abandoned or, at best, rail banked pursuant to the Board's interim trail use provisions. The Board made its policy preference for rail service continuation abundantly clear in its August 7 Decision. Here, as mentioned, MSCI seeks to acquire a portion of the line that is the subject of the above-captioned abandonment proceeding in order to continue rail service to Tetra Pak and Cargill. UP, on the other hand, although initially cooperative with MSCI's efforts, would like to be free from any STB oversight, especially the Board's OFA processes, so that UP may determine the ultimate disposition of the line without additional substantive Board involvement. For these underlying reasons, UP has asked the Board to reject the ROFA, arguing that MSCI's most recent filing is procedurally defective, that the ROFA cites the incorrect UP salvage value estimate for the Segment, that MSCI has failed to demonstrate financial responsibility, and that UP should be free to negotiate an "arms' length" transaction with MSCI if UP deems it in its interests to do so. As discussed below, UP's arguments ring hollow and do not support rejection of the ROFA. Rather they merely underscore UP's unwillingness to commit itself through the OFA processes to a transaction that would preserve rail service on the Segment.

UP attacks the ROFA for its reference to UP's salvage value for the Segment as \$446,461, rather than \$549,353. MSCI's attribution of the \$446,461 figure to UP was inadvertent, and resulted from rather hasty preparation of the ROFA and miscommunication regarding land valuations with MSCI's counsel retained to prepare the ROFA and this response to the Objection Letter. MSCI acknowledges that UP's total net salvage value estimate for the Segment is \$549,353, which correctly accounts for UP's land valuation of \$102,892, and, to the extent that this filing offers a correction to the ROFA, MSCI urges the board to accept it as such. Nevertheless, the ROFA quite accurately reflects the disagreement between MSCI and UP regarding land salvage value. Specifically, MSCI has undertaken a preliminary review of UP's land valuations, has concluded that the UP figures are grossly inflated and unjustified, and has determined that the land comprising the Segment right-of-way should be valued at no more than \$20,239, as broken down in the ROFA.

MSCI filed its ROFA guided by the recent Board decisions in Arizona & California Railroad Company – Abandonment Exemption – In San Bernardino and Riverside Counties, CA,

¹ "Although the June 17, 2009 decision allows trail use and public use negotiations to have begun, the Board reminds the parties that continued rail service, a possible outcome of the OFA process, takes priority over interim trail use/rail banking and public use." Union Pacific Railroad Company – Abandonment – In New Madrid, Scott, and Stoddard Counties, Missouri, STB Docket No. AB-33 (Sub-No. 261) slip op. at 1-2 (STB served Aug. 7, 2009) ("August 7 Decision"), citing Rail Abandonments–Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986).

The Honorable Anne K. Quinlan

August 11, 2009

Page 3 of 4

STB Docket No. 1022 (Sub-No. 1X) ("ARZC-Abandonment") – a proceeding upon which MSCI specifically has relied and has cited to in submitting its ROFA. As the ROFA explains, there is no substantive difference between the posture of the present abandonment proceeding and the one at issue in ARZC-Abandonment. In both cases, the re-filed OFA was tendered after the original OFA deadline had passed. In fact, MSCI filed its ROFA 11 days after the OFA deadline, compared to the offeror in ARZC-Abandonment, which re-filed its OFA 12 days after the OFA deadline in that case. MSCI's ROFA was filed one day after the effective date of the Board's decision granting abandonment,² whereas the offeror in ARZC-Abandonment re-filed its OFA a few days before the effective date in that proceeding. But this appears to be a procedural distinction without difference (and, as explained in footnote number two, a factor of the Board's own making to a degree), because, in the absence of an exercise of Board abandonment authority (consummation of the abandonment by the abandoning carrier), the Board retains jurisdiction over the subject rail line, maintaining oversight over its disposition. In sum, UP's insistence that the "timeframe for filing an OFA has come and gone" rings hollow, is inconsistent with ARZC-Abandonment, and merely underscores UP's desire to avoid the OFA process so that it can dispose of the Segment and the rest of the rail line as it sees fit, without regard to the impact on shippers.

UP's argument regarding MSCI's financial responsibility rings equally hollow. To begin with, there is no requirement in the Board's rules that the offeror demonstrate its financial responsibility to acquire rail property at the valuation attributed to it by the abandoning carrier, particularly where, as here, the offeror seriously disputes as inflated the abandoning carrier's net liquidation value estimate. MSCI has, however, clearly demonstrated that it has access to sufficient funds – through its parent, Pioneer Railcorp ("Pioneer") – to acquire the Segment for a purchase price of "at least" \$302,990 – the amount that MSCI has independently and reasonably adjudged the Segment to be worth. Nevertheless, Pioneer's president and CEO, J. Michael Carr, (also MSCI's president) has stated in verified testimony that Pioneer has cash on hand of approximately \$600,000, which is still in excess of UP's excessive asking price for the Segment (\$549,353), and he has conveyed that Pioneer's commitment to this transaction is not strictly

² At MSCI's request, the Board tolled the OFA period and the effective date of UP's abandonment authority, so that MSCI could obtain from UP information regarding the net liquidation value of the rail line in question and so MSCI could prepare its OFA. Specifically, MSCI sought a 30-day extension of the OFA deadline – then June 26, 2009. Because July 26 fell on a Sunday, MSCI had expected that the Board would have granted the 30-day extension until July 27, the following business day. Instead, the Board opted to make the OFA deadline fall on July 24, thus reducing the amount of time under which MSCI could assess UP's valuation evidence and present its OFA. Because the Board selected July 24 for the OFA deadline, the Board also set the effective date of the abandonment ten days thereafter, August 3, 2009, rather than August 6, 2009, which would have been the deadline had the board tolled the OFA process until July 27 as MSCI had anticipated the Board would do under the circumstances. If the Board had opted for the later date, then MSCI's ROFA would have been filed before the effective date of UP's abandonment authority.

BAKER & MILLER PLLC

The Honorable Anne K. Quinlan
August 11, 2009
Page 4 of 4

limited to MSCI's \$302,990 Segment valuation. In short, MSCI has made it sufficiently clear that it has access to sufficient funds to be able to purchase the Segment, even at an amount in excess of MSCI's current estimate.

Although MSCI appreciates UP's stated willingness to negotiate at arms' length for the sale of the Segment, MSCI notes that the statement is far from binding upon UP, and that the statement in no way obligates UP to work toward the preservation of rail service if more appealing options exist or were to arise during the course of any such MSCI-UP negotiations. Again, as noted in the Board's August 7 Decision, continued rail service, as a matter of agency policy, takes priority over alternative uses of the rail property that would not ensure such continued service. To permit UP at this juncture to be free of the OFA process and to allow UP to run with its unenforceable assurance to negotiate with MSCI in good faith would be to undercut the Board's policy preference for the preservation of rail service. Here, the only way for the Board to assure that MSCI may acquire the property for continued rail service at a price that is fair to all concerned is through the OFA process. To bar the execution of the OFA process now would give priority to UP's whims, rather than to the Board's clearly-stated policy preferences. The Board must keep such considerations in mind in balancing the interests and policy issues at play here.

For these reasons, UP's request for Board rejection of MSCI's ROFA should be denied, and the OFA process should be allowed to proceed consistent with recent Board decisions in ARZC-Abandonment. In that regard, MSCI has satisfied the regulatory requirements for an OFA process to be initiated, and UP's self-serving arguments to the contrary, which, again, are merely designed to evade the OFA process, are meritless.

Respectfully submitted,

The signature is written in cursive and includes the initials "by RW" at the end.

William A. Mullins
Counsel for Mississippi Central Railroad Co.

Cc: J. Michael Carr, Daniel A. LaKemper, all parties of record